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HAROLD B. WILLEY, Cl

IN THE

Supreme Court of the United States

October Term, 1953

No. 140

PAUL J. RAMSEY, Petitioner,

v.

THE STATE OF TEXAS, Respondent

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

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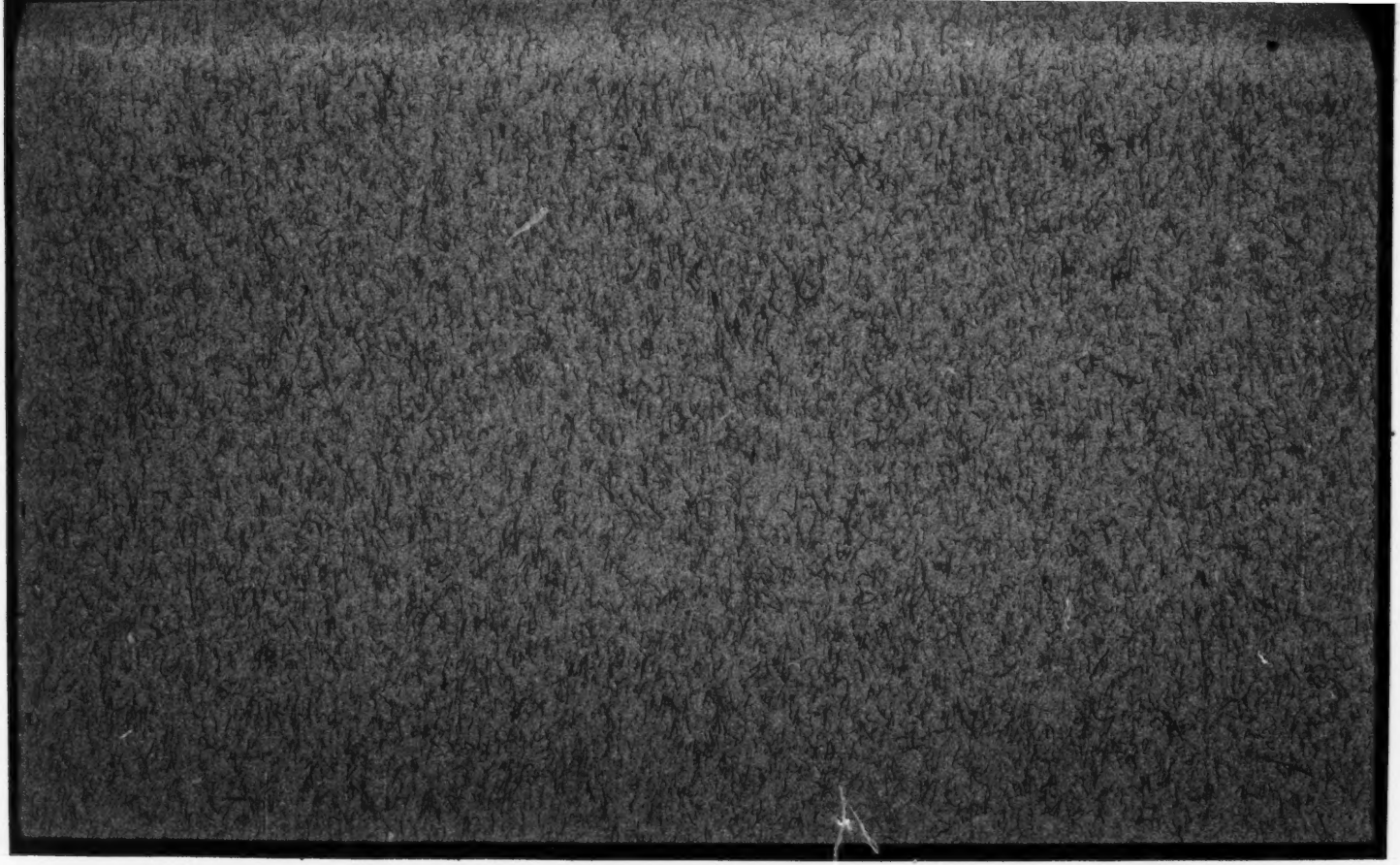

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IN THE

Supreme Court of the United States

October Term, 1953

No._____

FRED J. REDDING, *Petitioner*,

v.

THE STATE OF TEXAS, *Respondent*

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF

Petition for Writ of Certiorari To The Court of Criminal Appeals of the State of Texas

To The Honorable Chief Justice and Associate Justices of The Supreme Court of the United States:

Petitioner prays that a writ of certiorari issue to review the judgment of the Court of Criminal Appeals of the State of Texas entered upon January 20, 1954, and confirmed upon rehearing March 17, 1954, affirming the judgment of the Criminal District Court Number Two of Harris County, Texas, rendered upon June 3, 1953.

Opinion Below

The opinion of the Court below upon rehearing, which is the only opinion touching the question presented here, is printed in an appendix to this petition, for the convenience of this Court.

Basis for Jurisdiction

Jurisdiction is invoked under 28 U. S. C., Sec. 1257, (3).

Question Presented

The question presented here for determination is important, but may be stated briefly. It is as follows:

1. Whether, in criminal proceedings had under a Texas enhancement of punishment statute which provides "whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary" (Aritcle 63 VERNON'S PENAL CODE OF THE STATE OF TEXAS, ANNOTATED), which statute is punitive only and prescribes no method of trial for a third offense as such; and where the Legislature of Texas has prescribed no mode of trial for a third offense as such; and where the mode of trial of a third offense as actually practiced in this Petitioner's case differs from the mode of trial of an ordinary felony in that Petitioner's character is put in issue whether or not Petitioner consents, and may be put in issue without Petitioner's consent before the jury has heard evidence upon the set of allegations comprising the alleged third offense for which Petitioner is to be tried, and in that the allegations of Petitioner's prior misconduct may be read to the jury before the Petitioner enters a plea, it was so prejudicial to read the allegations of Petitioner's prior convictions to the jury before a plea had been entered, and to

call evidence before the jury of prior convictions of Petitioner before any evidence was heard touching the alleged third offense for which Petitioner was on trial, as to amount to a denial of due process of law.

Summary Statement

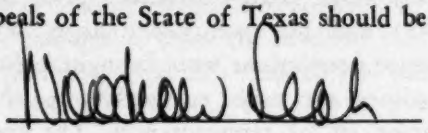
Petitioner was indicted for "theft-habitual criminal" by a Grand Jury of Harris County, Texas (R. p. 3). This indictment set out allegations of former convictions of Petitioner (R. p. 4). Following said allegations in the indictment it alleged the instant offense, to-wit, theft of an automobile (R. p. 5). This indictment, containing said allegations of former convictions of Petitioner was read to the jury before Petitioner pleaded (R. p. 11). Petitioner was convicted and sentenced to life imprisonment (R. pp. 11 and 17). The jury was charged by the Court and in the charge the Court instructed the jury that evidence of previous convictions must not be considered by the jury in considering the guilt or innocence of the Petitioner on the charge of the theft of the automobile of Charles E. Hill (R. p. 7). Extensive evidence was called by the State and was heard as to Petitioner's prior convictions (R. pp. 22-48) and for twenty-five pages of transcript Petitioner's prior convictions were brought before the jury before any witness was called to testify as to the allegations of the instant set of circumstances. The complaining witness was then called and his testimony heard on the instant accusation (R. p. 16). The Court of Criminal Appeals of the State of Texas in overruling Petitioner's motion for rehearing held that the Petitioner was not deprived of his Constitutional rights or due process of law by the way in which his trial was conducted (R. pp. 108, 109).

Reasons for Granting the Petition

This unique case presents a question of great public importance, involving the right to a fair trial by an unbiased and impartial jury, and directly concerning the mode of trial permitted for a particular type of case in the State of Texas. In addition, it appears that the Court of Criminal Appeals of the State of Texas makes a holding which is not in harmony with the spirit of the recent decisions of this Court, if not directly contrary to them, and any ambiguity existing should be settled with finality.

Since the question is a single one, we are incorporating our brief in support of this petition as part of the petition, following immediately hereafter, and have attached as an appendix the opinion of the Court of Criminal Appeals of the State of Texas upon motion for rehearing, for the convenience of this Court. We believe this matter is of the greatest importance, and that it can be resolved expeditiously by this Court to remove any confusion existing in this field and to correct the error of the Court below.

WHEREFORE, it is respectfully submitted that this petition for writ of certiorari to review the judgment of the Court of Criminal Appeals of the State of Texas should be granted.



Of Counsel

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Statement of Facts

The Petitioner adopts the Statement of Facts, as contained in the Record and as summarized in the Petition for Writ of Certiorari. There is no dispute as to the occurrences, but only as to the conclusions of law resulting therefrom.

Assignment of Error

The Court of Criminal Appeals of the State of Texas erred in affirming the judgment of the trial court, fundamental error appearing in the record, prejudicial and of such a nature as to deny the Petitioner "due process of Law" in contravention of the Fourteenth Amendment of the Constitution of the United States of America, the error being that a denial of the right to trial by a fair and impartial jury was apparent upon the face of the record.

Propositions of Law

The procedure adopted by the State of Texas in prosecuting the petitioner, as an "Habitual Criminal" under the statute prescribing same, was so prejudicial that a fair trial could not have been and because (a) of the reading of an indictment containing recitations of petitioner's prior convictions to the jury, before a plea thereto was entered and (b) because of the presentation of petitioner's past alleged record to the jury, before the actual trial or the presentation of the primary offense was had, constituted a "denial of due process of law" in contravention of the Fourteenth Amendment to the Constitution of the United States of America.

Authorities

Skipper v. Schumacher, 299 U.S. 507;
Lisenba v. People of State of California, — U.S. —, 62 S. Ct. 280, 86 L. Ed —;
Chambers v. State of Florida, 309 U.S. 227, reversing 187 So. 156, 136 Fla. 568;
Lanzetta v. State of New Jersey, 306 U.S. 451;
Commonwealth v. Morrow, 9 Philadelphia 583;
14 *Temple Law Quarterly* pp. 386-92;
35 *Notre Dame Lawyer*, pp. 376-7, 1949-50;
U.S.C.A. Const. Amend., 14 Section 1;
1 *Texas Penal St.*, Art. 62-63;
California Penal Code, Sec., 1093, (1949);
Nebraska Revised Statutes, Section 29-2221 (1943);
Ohio Code Annotated, Sec., 13744-3 (1938);
Pennsylvania Statutes Annotated, Title 19, Sec., 924 (1930);
"The Prevention of Crime Act" (1908) 8 Edward VII, c 59, Sec. 10;
Constitution of The State of Texas, Art. 1, Sec. 16-19;
28 U.S.C., Sec. 1257 (3).

Argument

I.

The procedure adopted by the State of Texas in prosecuting the petitioner, as an "Habitual Criminal" under the statute prescribing same, was so prejudicial that a fair trial could not have been had because (a) of the reading of an indictment containing recitations of petitioner's prior convictions to the jury, before a plea thereto was entered and because (b) of the presentation of petitioner's past alleged record to the jury, before the actual trial or the presentation of the pri-

mary offence was had, constituted a "denial of due process of law" in contravention of the Fourteenth Amendment to the Constitution of the United States of America.

The Court of Criminal Appeals of the State of Texas apparently has adopted the view that the procedure in prosecuting "Habitual Criminal" cases employed by the state attorneys, in reading an indictment containing recitations of petitioner's prior convictions to the jury before a plea is entered thereon and the presentation of the petitioner's prior and past alleged records before a proof of the primary offence was introduced, constituted no deprivation of constitutional rights to which the petitioner was entitled. We quote from the opinion, "On Motion for Rehearing" delivered by Morrison, Judge, which overruled petitioner's motion for rehearing, 265 S.W. 2d 811:

> "In the case at bar, the prior convictions were proven during the course of the trial, as they had to be in order to support the allegations in the indictment. If, in fact, the jury were prejudiced against the accused when they learned that he had twice before been convicted of felonies, we are at a loss to understand what difference it could make as to when that prejudice was injected into the case. The trial court in this case, as in all cases under Article 63, charged the jury that evidence of previous convictions must not be considered by the jury in considering the guilt or innocence of the accused in the primary offense.
>
> "The prior offenses were required to be plead and proven, and we can perceive of no deprivation of constitutional rights by these statutes which have been in existence for many years."

It is our feeling that decisions of this Court, both old and recent, together with decisions of other states with statutes predicated thereon wholly disagree with the position taken by the Texas Court.

It is a well settled principle that the prosecuting attorneys in the instant case acted as agents of the State, hence whatever action was taken by them in the case at bar, was a State action within this amendment, SKIPPER v. SCHUMACHER (1936), 299 U.S. 507.

The right to a fair and impartial trial is a fundamental one and the effectual security and enjoyment of this right depends upon a standard of procedure which is adequate and appropriate with regard to its protective qualities rather than to its formal qualities.

This rule was laid down by this Court in CHAMBERS v. STATE OF FLORIDA, 309 U.S. 227, when it stated:

> "The requirement of conforming to fundamental standards of procedure in criminal trials was made operative against the states by this amendment."

The Court was, of course, speaking of the Fourteenth Amendment of the Constitution, but yet the language in that opinion goes further when it added in that same case the following:

> "The 'due process' provision of this amendment, just as that in the Fifth Amendment, was intended to guarantee procedural standards adequate and appropriate to protect at all times people charged with or suspected of crime by those holding position of power and authority."

In the instant case a serious error was made in the administration of criminal law by the prosecutors trying the petitioner as an "habitual criminal".

A jury was impaneled to try the case of the petitioner accused of "Theft-Habitual Criminal". Then with the full approval of the trial judge the indictment was read to the said jurors containing recitations of the petitioner's prior alleged convictions. Surely the fact that the indictment, containing this additional material, was made available to the jury at that time, commenced the train of events which went very far to secure the conviction of the petitioner.

It must be noted, at this point, that this manner of trying persons, previously convicted of serious offences has not gone unnoticed by other jurists in this country. In a Pennsylvania case, quoted in 14 Temple Law Quarterly 386, COMMONWEALTH v. MORROW, 9 Phil. 583, the language used is very emphatic when it declares:

> "To allege in a bill of indictment, charging a man with a high felony that he previously had been convicted of a similar offense would be an anomaly in the administration of the criminal law. It would go very far to secure his conviction. It would render his evidence of good character of no practical value.
>
> "That which in other cases is jealously excluded by all rules of evidence, would be here thrown in with most disastrous consequences to the defendant, at a time too, when of all others, he should have a fair trial."

Here, therefore, we have a situation where the jury is being prepared and primed for the trial of, not an individual charged with a particular crime or offence, but rather of an accused which the allegations say is an "habitual criminal".

These are the conditions in which the petitioner found himself before the trial of *anything* had commenced. Not only has the jury been readied for the trial of a person in the manner aforesaid, but they are made conscious of a criminal act which does not exist.

The Court's attention is directed to Article 62, VERNON'S PENAL CODE OF THE STATE OF TEXAS, 1 Tex. Penal St., Art. 62:

> "If it be shown on the trial of a felony less than capital that the defendant has been before convicted of the same offense, or one of the same nature, the punishment on such second or other subsequent conviction shall be the highest which is affixed to the commission of such offenses in ordinary cases."

It is submitted that this article does not apply in the case at bar, since the highest punishment affixed to felony theft, of which the Petitioner was charged, is not life while in the situation at hand, the Petitioner was given a life sensence. Hence, from the preceding article the Court's attention is specifically directed to Article 63, 1 TEX. PENAL STAT., Art. 63:

> "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."

It is interesting to note that the latter article, commonly known as the "Habitual Criminal Statute" and referred to as such by the Court of Criminal Appeals of the State of Texas, while insignificant in text, can be the subject of this petition, since its effects are so overbearing.

This article as it stands today as part of the "Criminal Law" of the State of Texas must by its very nature be a punitive promulgation alone since it provides for no standard of conduct or guilt, nor does it provide for a procedure to be followed by those authorities wishing to enforce it.

Hence the statute, by its very lack of directive, leaves to the servants of the state a clear field as to the manner of its execution. The result is obvious. Since the act is vague, men of common intelligence must necessarily guess at its meaning and differ as to its application. LANZETTA v. STATE OF NEW JERSEY, 306 U.S. 451.

The pattern has now been set by the state prosecutors for the trial of an accused, seen by the eyes of the jury, as a person charged for three offenses rather than one. Of these offenses, they must identify a defendant as having been previously convicted of two felonies less than capital alleged in the indictment. This was proved to the jury in the instant case by the introduction of the minutes of the Court with regard to two prior convictions and the indictments on which these convictions were predicated. One of these evidentiary instruments for a conviction of a felony less than capital in October, 1939, the other was concerned with a conviction of a felony less than capital in February, 1943. The prosecuting attorney, at this point, presented other evidentiary points leading to the identification of the Petitioner as having been twice before convicted as a felon. All these matters were accomplished before the presentation of the primary offence to the jury and with the full approval of the trial judge. Argument in this regard is useless, the facts themselves constitute the best presentation of the petitioner's charge that he was denied a fair and impartial trial. The element of "fundamental fairness" was totally disre-

garded by the state officers, when in this of all trials, the petitioner should have been accorded the protection guaranteed by our constitution. This Court has spoken strongly on this point, and we quote from its opinion in LISENBA v. PEOPLE OF THE STATE OF CALIFORNIA, 62 S. Ct. 280:

> "As applied to a criminal trial, denial of due process of law" is the failure to observe that fundamental fairness essential to the very concept of justice, and in order to declare a denial of it, the Supreme Court must find that the absence of that fairness fatally infected the trial, and the acts complained of must be of such quality as necessarily prevent a fair trial."

We submit that in the instant case, the petitioner, by virtue of the reading of the indictment containing the recitations as aforesaid, and the presentation of the case to the jury in the manner as aforesaid was a "failure to observe that fundamental fairness essential to the very concept of justice," and that without doubt the "absence of that fairness fatally infected the trial" to the detriment of the petitioner herein. It is not difficult to see that when the evidence was received by the jury of the alleged "criminal disposition" of the petitioner, that the *likelihood* of finding him guilty of the offenses charged, regardless of whether it was proved by the evidence, became a *reality*.

We have not forgotten, that a statute such as Article 63, has merit in that it attempts to provide for a method to curb THE CONTINUOUS infraction of state laws by promulgating stringent penalties. We are not attacking the statute. Yet, in this regard it must not be forgotten that a person sought out and charged as an "habitual criminal" for the purpose of enhancing his punishment, is still entitled to a fair and impartial trial.

Many states have recognized this essential idea and have initiated laws to cope with the situation, keeping in mind that element of "fairness."

We find that an article in the NOTRE DAME LAWYER, Volume 35, pages 376-377 provides us with a resume clearly acceptable within the sphere of constitutional justice:

> "Under enlightened modern legislation for 'habitual criminals' the spirit of the law which recognizes a defendant's right to a fair trial, has been protected by statute in several states and in England. That Procedure divides the indictment into two parts. The entire indictment is read to the accused, and his plea is taken in the absence of the jurors. When the jury has been impaneled and sworn the Clerk reads only that part of the indictment which set forth the crime for which the defendant is supposed to be tried. The trial then proceed in every respect if there were no allegations of former convictions;
>
> "No mention of convictions are made in the evidence, or in the remarks of counsel or in the charge of the court. When the jurors retire to consider their verdict, only the first part of the indictment, on which the crime charged is set out is given to them. If the jurors return a verdict of guilty, the second part of the indictment, in which former convictions are alleged, is read to them without reswearing them, and they are charged to inquire on that issue."

References are then made to various statutes of states having similar procedures for "habitual criminals"; among those being:

California Penal Code, Sec. 1093 (1949);
Nebraska Revised Statutes, Sec. 13744-3 (1938);

Pennsylvania Statutes Annotated, Title 19, Sec. 924 (1930);
The Prveention of Crime Act, (1908) 8 Edward VII, c. 59 Section 10.

It can readily be seen that many states have recognized the importance of providing a specific method to be followed in cases involving "habitual criminals", by insertions in their respective laws of certain procedural guides, which in turn provide for a fair trial to an accused, whose punishment is to be enhanced.

The State of Texas has no such standard or guide for its prosecutors to follow. Hence the result is that so-called "habitual criminals" are tried in the manner such as this petitioner was tried, which manner was of such a nature as to have constituted a denial to a fair and impartial trial in contravention of the Fourteenth Amendment to the Constitution of the United States.

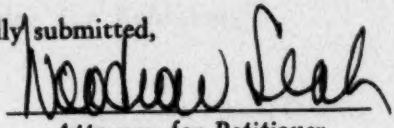
Conclusion

It would appear from the foregoing facts that the Court of Criminal Appeals of the State of Texas erred in upholding the Judgment and conviction of the trial court where the Petitioner was denied a fair and impartial trial in contravention of the Constitutional requirements of the United States.

It is therefore respectfully prayed, that a writ of certiorari be issued to the Court of Criminal Appeals of The State of Texas, to the end that this case may be reviewed and determined by this Court, that the judgment of the Court of Criminal Appeals of the State of Texas, be reversed and that

petitioner be granted such other and further relief as may seem fitting and proper.

Respectfully submitted,



Attorney for Petitioner

_____

_____

Of Counsel

APPENDIX
Opinion on Motion for Rehearing

Fred J. Redding, Appellant
No. 26,716. v. - - - - Appeal from Harris County
The State of Texas, Appellee

OPINION
ON MOTION FOR REHEARING

For the first time, on motion for rehearing in this Court, appellant contends that his trial was so conducted as to deny him due process as guaranteed by the Fourteenth Amendment to the Federal Constitution.

Appellant makes it clear that he is not attacking the constitutionality of Article 63, the so-called Habitual Criminal Statute. In order that his contention may be fully understood, we quote from his brief:

> "The indictment contains recitations of appellant's prior convictions which were read to the jury before the plea, and before the presentation of evidence, which reading and recitation were so prejudicial that a fair trial on the merits could not thereafter have been had and in effect are a denial of due process, in contravention of the Constitution of the United States of America."

We have been cited no authority upholding appellant's contention, and he describes it in argument as a novel one. Much emphasis is laid upon the fact that under our statutory procedure the indictment which contains the allegations of the prior convictions is read to the jury before the accused

is required to plead. He says that a great prejudice against the accused is aroused by such act. In the case at bar, the prior convictions were proven during the course of the trial, as they had to be in order to support the allegations in the indictment. If, in fact, the jury were prejudiced against the accused when they learned that he had twice before been convicted of felonies, we are at a loss to understand what difference it could make as to when that prejudice was injected into the case. The trial court in this case, as in all cases under Article 63, charged the jury that evidence of previous convictions must not be considered by the jury in considering the guilt or innocence of the accused in the primary offense.

The prior offenses were required to be plead and proven, and we can perceive of no deprivation of constitutional rights by these statutes which have been in existence for many years.

Under Texas practice the jury passes upon the facts and also assesses the punishment (if not definitely fixed by law). We know of no means whereby the statutes for enhancement of punishment because of previous convictions could be used other than by the fact of such prior conviction being alleged and proved and the jury instructed as to the purposes of such allegation and proof and its application if they find that the appellant was the person so previously convicted.

To agree with appellant's contention would be to destroy the enhancement of punishment statutes.

Appellant's motion for rehearing is overruled.

Morrison, Judge

(Delivered March 17, 1954)

SEP 17 1954
HAROLD B. WILLEY, Clerk

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THE STATE OF TEXAS,
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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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IN THE

Supreme Court of the United States

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FRED J. REDDING,
Petitioner,

vs.

THE STATE OF TEXAS,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Now comes respondent, the State of Texas, and files this its brief in opposition to the petition for writ of certiorari.

Opinions Below

The opinion of the Court of Criminal Appeals of Texas is reported in —— Tex. Crim. ——, 265 S. W. 2d 811. The opinion of the Court of Criminal Appeals on motion for rehearing is found at —— Tex. Crim. ——, 265 S.W. 2d 815.

Jurisdiction

Petitioner invokes jurisdiction under 28 U.S.C., Sec. 1257(3).

Question Presented

Was petitioner, who was indicted for theft and as an habitual criminal under Article 63, Texas Penal Code (Vernon 1948), denied a fair trial solely because the prosecuting attorney was allowed to read the indictment to the jury and to present evidence supporting the allegations in the indictment?

Statement

(Petitioner having failed to furnish respondent with a copy of the record which petitioner filed in this Honorable Court, respondent's references are to the Transcript and to the Statement of Facts now on file in the Court of Criminal Appeals on Texas.)

On October 2, 1939, petitioner pleaded guilty to a felony offense, the crime of robbery by assault. (Tr. 3) On February 15, 1943, petitioner was indicted for the crime of forgery, a felony, and he again pleaded guilty. (Tr. 4,5) The above facts were alleged, pursuant to Articles 504 and 405, Texas Code of Criminal Procedure (Vernon 1948) and Article 63, Texas Penal Code (Vernon 1948), in an indictment for theft returned by a grand jury of Harris County, Texas, on May 20, 1953 (SF 1, 2, 3), to which petitioner pleaded not guilty. (SF 9) At the trial, the indictment in question was read to the jury

in accordance with the terms of Article 642, Texas Code of Criminal Procedure (Vernon 1948). (SF 9) The State then presented proof of the former convictions in order to sustain the allegations in the indictment. This evidence was neither objected to nor contradicted. (Tr. 1-51) Petitioner did not testify. The jury found petitioner guilty of felony theft; it further found, on the undisputed evidence, that he was twice before convicted of felonies less than capital as set out in the indictment. (SF 9) The mandatory sentence imposed by the court under Article 63, *supra*, was life imprisonment in the state penitentiary. (SF 15)

Petitioner made a motion for a new trial (SF 11, 12, 13) which was overruled by the trial court. (SF 14) He then perfected an appeal to the Court of Criminal Appeals at Austin, Texas (SF 15, 16), and the Court affirmed his conviction. Petitioner's next procedural move was a motion for rehearing of his cause before the Court of Criminal Appeals. This motion was overruled.

At no point throughout the entire record of the proceedings before the trial court did petitioner once complain of a denial of due process. At no point was the Fourteenth Amendment to the United States Constitution mentioned. Nowhere in the record does the word "prejudice" appear. This is equally true of petitioner's appeal from the judgment of conviction. Nowhere in his brief before the Court of Criminal Appeals did petitioner claim that he had been denied due process of law and that his trial was unfair because the jurors were prejudiced against him. As a convicted criminal sentenced to life imprisonment,

petitioner suggested for the first time in his motion for rehearing that he had been denied due process of law by the State of Texas. The Court of Criminal Appeals, in denying petitioner's motion, perfunctorily dismissed this contention.

Petitioner now asks this Honorable Court to issue a writ of certiorari to the Court of Criminal Appeals of Texas for further review of the case.

Argument

Petitioner was indicted, tried, and convicted under the "Habitual Criminal Statute," Article 63, Texas Penal Code (Vernon 1948), which provides:

> "Whoever shall have been three times convicted of a felony less than capital shall on such third conviction be imprisoned for life in the penitentiary."

The petitioner, after his conviction had been affirmed by the Court of Criminal Appeals, abruptly decided that his trial was unfair and that, as a consequence, he was denied due process of law under the Fourteenth Amendment to the United States Constitution. Petitioner would have this Honorable Court grant a writ of certiorari to the Court of Criminal Appeals solely because the prosecuting attorney was allowed to read the indictment to the jury and to present evidence in support of its allegations.

Specifically, petitioner, who has twice before pleaded guilty to felony offenses, now objects because: (1) The prosecuting attorney read the indict-

ment containing allegations of petitioner's prior convictions to the jury before petitioner was permitted to plead; and (2) The prosecution chose to introduce its proof in support of these allegations before it presented its proof on the main charge in the indictment. Petitioner's strenuous objections to this procedure are of quite recent origin, stemming as they do from the time of his motions for rehearing before the Court of Criminal Appeals. It is clear that petitioner has strained mightily to avoid the consequences of his repeated transgressions against society when we consider the fact that at his allegedly "unfair" trial he made not a single objection to the "legally warped" proceedings then in progress against him. Petitioner was silent in the trial court. He was silent on appeal. Only after the Court of Criminal Appeals affirmed his conviction, which carried with it a sentence of life imprisonment, did petitioner begin to comprehend the alleged unfairness of the procedure used to increase the punishment for third offenders.

Petitioner dared not to attack the constitutionality of the Habitual Criminal Statute. That such acts are constitutional is now beyond dispute. They have been held so over all manner of due process objections. *Graham v. West Virginia*, 224 U.S. 616 (1912). The purpose of these statutes is apparent, and the number of them on the books throughout all of the United States conclusively proves their necessity.

Petitioner instead chose to attack the time-honored procedure used in effectuating the provisions of the act. It is true that Article 63 does not set forth

any particular procedure to be used in bringing an habitual criminal to justice. The legislative body undoubtedly felt that this was unnecessary in view of the other provisions of the Penal Code and of the Code of Criminal Procedure which were designed not only to rid society of those who flaunt its mandates but to insure to them a fair hearing before an impartial jury and a readily accessible mode of appeal. Respondent submits that the following statutes were intended by the legislature to encompass all criminal proceedings and that these statutes, within their limited orbits, adequately assure due process to all offenders.

Art. 504, Texas Code of Criminal Procedure:

"The primary pleading in a criminal action on the part of the State is the indictment or information."

Art. 405, Texas Code of Criminal Procedure:

"An indictment shall be deemed sufficient which charges the commission of the offense in ordinary and concise language in such a manner as to enable a person of common understanding to know what is meant, and *with that degree of certainty that will* give the defendant notice of the particular offenses with which he is charged, and *enable the court, on conviction, to pronounce the proper judgment;* and in no case are the words 'force and arms' or 'contrary to the form of the statute' necessary." (Emphasis added)

Art. 642, Texas Code of Criminal Procedure:

"A jury being impaneled in any criminal action, the cause shall proceed in the following order:

1. *The indictment or information shall be read to the jury by the attorney prosecuting.*

2. The special pleas, if any, shall be read by the defendant's counsel, and if the plea of not guilty is also relied upon, it shall also be stated.

3. The State's attorney shall state to the jury the nature of the accusation and facts which are expected to be proved by the State in support thereof.

4. The testimony on the part of the State shall be offered.

5. The nature of the defenses relied upon and the facts expected to be proved in their support shall be stated by defendant's counsel.

6. The testimony on the part of the defendant shall be offered.

7. Rebutting testimony may be offered on the part of each party." (Emphasis added)

The prosecution in this case complied strictly with the provisions of these statutes. It is this compliance with legislative mandates which petitioner now finds so onerous. Yet this very procedure, whereby prior convictions of the accused are alleged in the indictment brought against him and proof of the prior con-

victions so alleged is introduced at the trial and which petitioner lately asserts operated to deny him due process of law has been expressly sanctioned by the courts of Texas as well as by the courts of many other States and by the Federal courts (in federal cases dealing with the National Prohibition Act). *Childress v. State*, 131 Tex. Crim. 487, 100 S.W. 2d 102 (1936); *Choate v. State*, 131 Tex. Crim. 147, 97 S.W. 2d 189 (1936); *Nabors v. State*, 137 Tex. Crim. 465, 131 S.W. 2d 962 (1939); *Bradley v. Commonwealth*, 288 Ky. 416, 156 S.W. 2d 469 (1941); *Maguire v. Maryland*, 47 Md. 485 (1878); *McCarren v. United States*, 8 F. 2d 113 (C.C.A. 7th 1925); *Massey v. United States*, 281 Fed. 293 (C.C.A. 8th 1922); *Kubik v. United States*, 53 F. 2d 763 (C.C.A. 8th 1931); *Klein v. United States*, 14 F. 2d 35 (C.C.A. 1st 1926); *Powell v. United States*, 35 F. 2d 941 (C.C.A. 9th 1929).

In the leading case of *People v. Sickles*, 156 N.Y. 541, 51 N. E. 288 (1898), the defendant had been indicted for robbery and as a second offender under a statute very similar to the Texas act. The defendant pleaded not guilty at his arraignment. But before the jury was impaneled for the trial of the cause, defendant *admitted* the former conviction and thereafter sought to have the evidence of the prior conviction excluded. Defendant contended that: (1) The penal statute providing for an increased penalty upon second conviction only authorized the introduction of the evidence of the former conviction *after* the jury had found defendant guilty of the principal offense; and (2) If the evidence of the former conviction was admissible as a part of the main case,

then defendant was deprived of the presumption of innocence and denied due process of law. The New York Court of Appeals in upholding the defendant's conviction and in rejecting his contentions made the following statement at page 290:

> "How can it be said that the defendant has not had due process of law? The statute announced the enhanced penalty which he would incur by repeating his infraction of the laws against crime. The indictment charged him with the aggravated crime, and he was put upon his trial under the charge of being for a second time an offender, and therefore liable to suffer a severer punishment. His sentence was pronounced after he had been tried and found guilty by the verdict of a jury. The course of the administration of justice was regular in all respects. When it is said that the presumption of the defendant's innocence was destroyed by the introduction of proof of his former conviction, the proposition is based upon mere assumption, and it is the error in that assumption which affects the appellant's argument.... The defendant had the benefit of it [the presumption of innocence] upon his trial, in that the court directly instructed the jury to that effect. It will not be presumed that the jurors failed to obey the instruction, or that they did not accord to the accused the benefit of every reasonable doubt upon the evidence. There can be no legal presumption that the presumption of the defendant's innocence will be prejudiced. The legislature can do as the English parliament has done by changing the rule of procedure. But that rests in the legislative discretion, and, until it is exercised in that direction, the established procedure must be followed, and the proof must

be such as to meet the charge and bring the case within the statute."

In the case now before this Honorable Court the trial court was eminently fair to petitioner in his charge to the jury. The court afforded petitioner that protection of his liberty guaranteed to him by the Fourteenth Amendment to the United States Constitution when he instructed the jury that they were under no circumstances to consider the evidence of former convictions in determining the guilt or innocence of the accused. (SF 5) He further correctly instructed that the accused is presumed to be innocent until his guilt is established beyond a reasonable doubt. (SF 6) The law cannot and does not presume that a jury, properly instructed, will refuse to heed those instructions. Such a presumption would immediately bring about the abolition of our system of trial by jury—that system which has long been the pride of Anglo-American jurisprudence. And yet this is the presumption upon which petitioner's entire argument is based. Petitioner *presumes* that the jurors did not obey the court's admonitions and that they were prejudiced against him. Moreover, he assassumes that his trial was unfair. Respondent submits there is not one shred of evidence in the record to support petitioner's contentions. Respondent invites petitioner to point out a single page in the record which will give foundation to petitioner's erroneous assumptions.

It is respondent's firm contention and belief that petitioner was fairly tried—that he had the benefit of every safeguard which the United States Constitution provides for the protection of its citizens.

In any event, the question before this Court is exceedingly narrow. It turns solely on the fairness of the procedure used by the State of Texas to bring habitual criminals to justice. As was pointed out earlier in respondent's brief, this procedure is in widespread use throughout the United States; and the fact that such a procedure is commonly used is plainly worth considering in determining whether or not it "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97 (1934). Mr. Justice Cardozo, writing for the majority in the case last cited, had this to say at page 105:

> "Its procedure [that of Massachusetts] does not run foul of the Fourteenth Amendment because another method may seem to our thinking to be fairer or wiser or to give a surer promise of protection to the prisoner at the bar."

Respondent does not contend that the procedure in use in the Texas courts is the best possible means of ridding society of habitual criminals. Respondent earnestly urges, however, that the Texas procedure is a fair procedure, and that it adequately protects those fundamental rights insured to all by the United States Constitution. This is all that the Due Process Clause of the Fourteenth Amendment requires. In *Carter v. Illinois*, 329 U.S. 173, 175 (1946) it was said:

> "But the Due Process Clause has never been perverted as as to force upon the forty-eight

States a uniform code of criminal procedure. Except for the limited scope of the federal criminal code, the prosecution of crime is a matter for the individual States. The Constitution commands the States to assure fair judgment. Procedural details for securing fairness it leaves to the States. It is for them, therefore, to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures."

This Court expressed the same views in the earlier case of *Graham v. West Virginia, supra.* The *Graham* case is an interesting one in the light of petitioner's present objections. In that case the defendant was also a third offender. After defendant had been convicted of crime and sentenced for the third time, the prosecuting attorney filed an information in which he alleged the prior convictions of the defendant. The West Virginia statutes specifically provided for such a separate proceeding in the event that the prior convictions were not alleged in the last indictment brought against an offender. The proceeding wherein the defendant's punishment was increased was entirely separate and apart in the *Graham* case. It occurred after defendant had been sentenced. It was initiated by a separate pleading. In that case the defendant vigorously asserted that the West Virginia statutes mentioned above were unconstitutional, and that such a procedure operated to deny him due process of law. The opinion in the

Graham case was unanimous; the Court said at page 629:

> "Although the state may *properly* provide for the allegation of the former conviction in the indictment, for a finding by the jury on this point in connection with its verdict as to guilt, and thereupon for the imposition of the full sentence, there is no constitutional mandate which requires the state to adopt this course even where the former conviction is known. It may be convenient practice, but it is not obligatory. (Emphasis added)

Thus this Honorable Court expressly sanctioned the procedure in use in the Texas courts. This Court said that a "state may properly provide for the allegation of the former conviction in the indictment, for a finding by the jury on this point in connection with its verdict as to guilt." In the *Carter* case, *supra*, this Court held that so long as the procedure used to convict an accused person is fair, the due process requirements of the Fourteenth Amendment are met. Clearly the matter of state criminal procedure is a matter for the State legislature. The Texas legislature has provided a fair method to be used in trying habitual offenders, and any proposed change in the procedure now in use must be left to legislative discretion.

Respondent takes issue with the statement made by petitioner on page 11 of petitioner's brief to the effect that the Texas Habitual Criminal Statute is

vague and that "men of common intelligence must necessarily guess at its meaning and differ as to its application." Petitioner now grasps at straws. The essential provision of Article 63 could not have been more clearly or more concisely expressed. The meaning is clear to all men of common intelligence. The Texas legislature declared that upon third conviction for a felony offense less than capital, the convicted person *must* be sentenced to life imprisonment in the penitentiary. There is no ambiguity and no vagueness in that language. The purpose of the statute is clear. It is purely and simply a punitive measure designed to deter repeated criminal acts. The statute in no way undertakes to define a new offense or to set up a novel procedure. It simply enhances the punishment for third offenders. The objection concerning vagueness is out of place. *Williams v. State*, 109 Tex. Crim. 450, 5 S.W. 2d 514 (1928). The legislature went into great detail in setting forth the procedure to be used in all criminal actions. This type of action presents no exception. The directions are clear. The State followed those directions to the letter. Any change in procedure must be left to our lawmakers.

Petitioner having failed to object on due process grounds in the trial court and further having failed to object on his appeal to the Court of Criminal Appeals of Texas, that Honorable Court made short shrift of the contentions which petitioner so tardily raised on his motion for rehearing. The Court said:

"We have been cited no authority upholding appellant's contention, and he describes it in argument as a novel one." The Court obviously felt that petitioner's arguments are frivolous, and the opinion therefore deals summarily with petitioner's contentions. (The opinion of the Court of Criminal Appeals overruling petitioner's motion is quoted in full in the Appendix to petitioner's brief).

The question before this Honorable Court is an exceedingly narrow one involving as it does a matter of State procedure, which procedure has been expressly approved by this Court in the case of *Graham v. West Virginia, supra.* Further, petitioner's entire argument is based upon the false assumption that jurors will not obey the instructions given to them by the trial court. Mr. Justice Cardozo, writing in the case of *Snyder v. Massachusetts, supra,* picked the bones of petitioner's argument clean when he said at page 122:

> "There is danger that the criminal law will be brought into contempt—that discredit will even touch the great immunities assured by the Fourteenth Amendment—if gossamer possibilities of prejudice to a defendant are to nullify a sentence pronounced by a court of competent jurisdiction in obedience to local law, and set the guilty free."

Conclusion and Prayer

For the foregoing reasons, respondent prays that this petition for Writ of Certiorari be in all things denied.

Respectfully submitted,

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A copy of this Reply, together with a copy of the letter of transmittal to the Clerk of the United States Supreme Court, have been mailed this date to Peter S. Navarro, Jr., 801 Republic Building, Houston 2, Texas; Woodrow Seals, Chronicle Building, Houston, Texas, and Walter Conway, c/o Carl J. Rector, Esperson Building, Houston, Texas; attorneys for Petitioner (First Class Postage Prepaid).